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CASE NO. 86-1320

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

SWIFT TEXTILES, INC.,

Petitioner,

v.

WATKINS MOTOR LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

I.

STATEMENT OF CASE

Respondent believes that pertinent additions to the statement of the case would be constructive.

At all times Petitioner, who purchased the spinning machinery from Rieter

Machine Works, Ltd. in Basle, Switzerland, was the ultimate consignee at LaGrange, Georgia. The ocean bill of lading shows Rieter as the Exporter, D.J. Powers Company, Inc. of Savannah, Georgia (Petitioner's agent, Freight Forwarder and custom house broker), as Consignee and Petitioner as the Notify Party. The destination on the ocean bill was Savannah. The container came to rest only temporarily in a trucking company holding yard in Savannah solely for the purpose of awaiting arrangement by Petitioner for motor carrier movement to LaGrange, Georgia. Petitioner's agent prepared the bill of lading on agent's short form of motor carrier uniform straight bill of lading. Agent's short form motor carrier bill of lading contained the the following certification: "It is certified that

the property in this receipt was imported in the importing carrier TFL Enterprise Sing. from port of Hamburg". The bill of lading also acknowledged that the shipment was: "Received, subject to the classification and tariffs in effect on the date of the issue of this Bill of Lading". The motor carrier bill of lading showed Petitioner as both the shipper and the consignee. This motor carrier bill of lading recited agreement between the shipper (Petitioner) and the carrier (Respondent) that every service would be subject to the terms and conditions of the applicable motor carrier classification or tariff and further contained the following: "Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back

thereof, **set forth in the classification or tariff which governs the transportation of the shipment,** and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns". (Emphasis added)

Respondent had no intrastate operating rights in the State of Georgia and thus had no tariffs on file with the Georgia Public Service Commission. The only tariff of Respondent available to Petitioner or its agent at Savannah was the tariff governing imported containers on file with the Interstate Commerce Commission, governing the motor carrier transportation of containers which had been imported by ocean carrier. This was the tariff to which the motor carrier bill of lading prepared by Petitioner's agent committed Petitioner to be bound.

It was the only applicable Carmack permissible tariff in existence and contained the two-year, one-day Statute of Limitations.

II.

SUMMARY OF RESPONDENT'S ARGUMENT

A.

The Eleventh Circuit Court Correctly Held That the Carmack Amendment to the Interstate Commerce Act Applies to the Savannah, Georgia to LaGrange, Georgia Segment of the Movement of a Shipment Originating in Basle, Switzerland Destined to LaGrange, Georgia.

The shipment from Basle, Switzerland to LaGrange, Georgia was one single continuous movement of a product manufactured in Basle, Switzerland, purchased by Petitioner from the Swiss manufacturer, and imported by Petitioner to

LaGrange, Georgia. When the shipment left Basle the consignee was Petitioner at LaGrange, Georgia, and it never became a part of the general mass of commerce in the United States and never came to rest until delivered to LaGrange, Georgia. The fact that destination on the ocean bill was the Port of Savannah, Georgia and that the subsequent movement was on a separate bill of lading does not change the character of the commerce. It is difficult to find a fact situation where the nature of the commerce was more clearly defined from point of origin to point of destination as being a single movement of foreign commerce. Neither the ultimate consignee nor the ultimate destination ever changed. The Interstate Commerce Commission has jurisdiction over the transportation by motor carrier of

property transported by motor common carrier "between a place in the United States and a place in a foreign country to the extent that the transportation is in the United States" 49 U.S.C. § 10521(a)(1)(E). The statute does not say "from" a place in the United States "to" a place in a foreign country but "between" the places. Thus it covers the domestic segment of the movement in either direction.

B.

The Eleventh Circuit Court Correctly Held that Respondent's Tariff Published and Filed with the Interstate Commerce Commission was Effectively Incorporated in the Bill of Lading Prepared by Petitioner's Agent at Savannah.

The Eleventh Circuit Court opinion sought to be reviewed does not conflict

with any opinion of any other Circuit Court nor any prior opinion of the Eleventh Circuit as contended by Petitioner.

III.

ARGUMENT

A.

The Eleventh Circuit Court Correctly Held That the Carmack Amendment to the Interstate Commerce Act Applies to the Savannah, Georgia to LaGrange, Georgia Segment of the Movement of a Shipment Originating in Basle, Switzerland Destined to LaGrange, Georgia.

The jurisdiction of the Interstate Commerce Act governed the motor carrier movement from Savannah, Georgia to LaGrange, Georgia because that movement was transportation by a motor common carrier "between a place in the United

States and a place in a foreign country to the extent that the transportation is in the United States." 49 U.S.C. § 10521(a)(1)(E).

No more clearly stated authority for this conclusion can be cited than that contained in the opinion of the Eleventh Circuit in this case:

"The nature of a shipment is not determined by a mechanical inspection of the bill of lading nor by when and to whom title passes but rather by 'the essential character of the commerce' United States v. Erie RR Co., 280 U.S. 98, 102, 50 S.Ct. 51, 53, 74 L.Ed. 187, 206 (1929), reflected by the 'intention formed prior to shipment, pursuant to which property is carried to a selected destination by a continuous or unified movement', Great Northern RR Co. v.

Thompson, 222 F. Supp. 573, 582 (D.N.D. 1963) (3-judge court).

"It is well settled that, in determining whether a particular movement of freight is interstate or intrastate or foreign commerce, the intention existing at the time the movement starts governs and fixes the character of the shipment...[T]emporary stoppage within the State, made necessary in furtherance of the interstate carriage, does not change its character."

The fact situation here is unequivocal. All of the facts demonstrate with unimpeachable clarity that Petitioner was the consignee of the movement at all times from origin at Basle, Switzerland to destination at LaGrange, Georgia. Petitioner bought the machinery from the Swiss manufacturer. The record is silent

on the shipping document from Basle, Switzerland to the Port of Hamburg, Germany. However, the record is clear. Petitioner's agent was the consignee on the ocean bill of lading and Petitioner was the notify party on the ocean bill. Petitioner was the consignee on the motor carrier bill on which the textile machinery moved from Savannah, Georgia to LaGrange, Georgia. There is not a scintilla of evidence to suggest that the "essential character of the commerce" ever changed from being one continuous movement of foreign commerce by various forms of transportation from Basle, Switzerland to LaGrange, Georgia. Any intermediate stops were only those essential to the mechanical changes in mode of transportation.

The jurisdiction of the Interstate Commerce Commission under 49 U.S.C. § 10521(a)(1)(E) is beyond question. 49 U.S.C. § 10762 requires a motor common carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission to publish and file with the Commission tariffs containing rates, classifications, rules and practices. Respondent complied with this requirement. The parties agreed in the motor carrier bill of lading prepared by Petitioner's agent to be bound by the published tariffs applicable to the movement. The applicable published tariff on file with the Interstate Commerce Commission contained the two-year, one day limitation within which suit could be brought as is authorized by the Carmack Amendment [49 U.S.C. § 11707(e).]

A case very much in point which was most convincing both to the trial judge and to the Eleventh Circuit Court of Appeals is the three judge court case of North Carolina Utilities Commission v. U.S., 253 F. Supp. 930 (E.D.N.C. 1966).

B.

The Eleventh Circuit Court Correctly Held that Respondent's Tariff Published and Filed with the Interstate Commerce Commission was Effectively Incorporated in the Bill of Lading Prepared by Petitioner's Agent at Savannah.

There is no conflict between the decision of the Eleventh Circuit in this case which is the object of the Petition for Writ of Certiorari and any decision of the United States Supreme Court, or of the Eleventh Circuit or any other Circuit.

Petitioner argues that the opinion of the Supreme Court of the United States in Reider v. Thompson, 339 U.S. 113, 70 S.Ct. 499, 94 L.Ed. 698 (1950) is authority for the proposition that if a continuous movement from a foreign country to a destination within the United States moves on a separate bill of lading from the port of entry in the United States the character of the commerce is controlled by whether the shipment crosses state lines within the U.S. From this Petitioner argues that the movement from Savannah, Georgia to LaGrange, Georgia is intrastate commerce and not subject to an interstate tariff on file with the Interstate Commerce Commission. The original wording of the Carmack Amendment in 49 U.S.C. 20(11) appeared to limit the Carmack Amendment to interstate commerce

and foreign commerce involving a point from within the U.S. to an adjacent foreign county, thus excluding the domestic segment of inbound foreign commerce. Apparently, this language was designed by Congress to avoid legislating concerning foreign commerce entering the United States and moving to a destination in the United States on a foreign bill of lading. See Condakes v. Smith, 281 F. Supp. 1014, 1015 (D.Mass. 1968) involving a shipment of cantaloupes from Mexico to Boston on a single through foreign bill of lading. However, the teaching of Reider v. Thompson is that on an imported movement when the domestic portion of the movement is on a separate bill of lading the Carmack Amendment will apply without regard to whether the United States segment crosses state lines.

The recodification of the United States Code involving the Interstate Commerce Act found in the 49 U.S.C. § 10521(a)(1)(E) clarifies this point and renders it clear that the Interstate Commerce Commission has jurisdiction over the transportation of property by motor carrier "between a place in the United States and a place in a foreign country to the extent that the transportation is in the United States". This language avoids the distinction between the domestic segment of an importation and an exportation relied upon in Condakes, and thus now avoids the necessity to distinguish between a foreign bill and a domestic bill.

Petitioner also contends that the decision of the Eleventh Circuit in the case sought to be reviewed is in conflict

with the Eleventh Circuit decision of Allstate Ins. Co. v. Int'l Shipping Corp., 703 F.2d 497 (11th Cir. 1983), and the Fifth Circuit decision in Marvirazon Compania Naviera, S.A. v. H.J. Baker & Bros. Inc., 674 F.2d 364, 366 (5th Cir. 1982). These cases involved admiralty law, ocean shipping and liability of ocean carriers. The Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1303(6), prescribes a one year Statute of Limitations for liability of the ocean carrier and the ship and narrowly defines the areas of liability. The Harter Act, 46 U.S.C. § 190, makes it unlawful for an ocean carrier to insert in a bill of lading any provision limiting the carrier's liability. On the one hand Congress carefully protected ocean carriers in COGSA and on the other in Harter

prohibited insertions in bills of lading attempting to further limit liability. The statutory schemes and judicial decisions involving ocean carriage under COGSA and Harter and land carriage under the Carmack Amendment cannot be analogized as the histories and statutory approaches are so vastly different. It is interesting that the colorful author of the opinion sought to be here reviewed was likewise the author of Marvirazon. Marvirazon held actual notice of the one year tariff limitation of the stevedore liability on file with the Federal Maritime Commission was necessary because such limitations are not required by law to be in the tariff. The Eleventh Circuit opinion in the present case sought to be reviewed deals very effectively with the distinctions between these

cases. Another point that should be mentioned is that the contract of carriage which Petitioner seeks to evade was prepared by Petitioner's own agent, a presumably experienced custom house broker and this contract bound the parties to the terms and conditions of the tariff and classifications governing the movement. Certainly a custom house broker knows that the bill of lading it prepares which certified that the container had a prior ocean movement would be subject to the applicable container tariff on file with the Interstate Commerce Commission. Petitioner in this case is not a victim of any unfair fine print in a contract but is a victim of its own failure to file suit within the period authorized by statute and provided by the contract of carriage. Furthermore,

Petitioner is chargeable, as a matter of law, with notice of the tariff and classification required to be on file with the Interstate Commerce Commission. American Railway Express Co. v. Daniel, 269 U.S. 40 (1925); Farley Terminal Company v. Atchison, Topeka and Santa Fe Ry., 522 F.2d 1095 (9th Cir.), cert. den., 423 U.S. 996 (1975). Petitioner's actual knowledge is irrelevant.

IV.

CONCLUSION

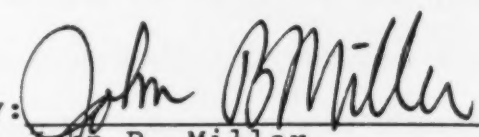
The Petition for Writ to the Eleventh Circuit does not qualify under United States Supreme Court Rule 17. The Petition does not present to the United States Supreme Court a conflict of decisions within the Eleventh Circuit or a conflict of decisions with another Circuit nor a conflict with a State Court of

last resort nor has it so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for the exercise by the United States Supreme Court of its power of supervision nor does it otherwise in any manner suggest the need for the Supreme Court of the United States to exercise its discretion to review the Circuit opinion.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MILLER, SIMPSON & TATUM

By: 
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PROOF OF FILING AND SERVICE

I, the undersigned JOHN B. MILLER, attorney of record for the Respondent and a member of the Bar of the Supreme Court of the United States, deposes and says that on the 18th day of February, 1987, I filed 40 copies of the foregoing BRIEF OF RESPONDENT ON WRIT OF CERTIORARI to the Supreme Court of the United States with the Clerk of the Supreme Court of the United States and I served three copies of this BRIEF OF RESPONDENT ON

WRIT OF CERTIORARI to the Supreme Court of the United States on Alan S. Gaynor, attorney for Petitioner, whose address is Bouhan, Williams & Levy, Post Office Box 2139, Savannah, Georgia 31498-1001, who are all the parties required to be served, by causing to be placed these copies of said BRIEF OF RESPONDENT ON WRIT OF CERTIORARI in an authorized depository for mail at a United States Post Office in a properly addressed envelope with sufficient prepaid postage thereon to insure First Class Certified Mail delivery within the time allowed for

such filing.

John B. Miller

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Sworn to and subscribed
before me this 18th
day of February,
1987.

Judith L. Asaro
Notary Public, State of Georgia

My Commission Expires:

JUDITH L. ASARO
Notary Public, Chatham County, Georgia
My Commission Expires Oct. 31, 1989